PRIVATE ACTION FOR OBSTRUCTION TO PUBLIC RIGHT OF PASSAGE.

II.

As to authority: first, as to a general answer to our main question; second, in regard to certain specific classes of cases. It should be said at the outset that, while an attempt has been made to refer to illustrative cases upon each important sub-topic, yet this article does not purport to give all the cases in point; much less to collect authorities which have only a collateral bearing.[64]

General tendency of English cases:.

Two early cases in the Year Books do not seem entitled to great weight. The full reports of these cases are translated in the note below.[65]

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[64]We must eliminate various decisions based on collateral grounds, not affecting the main issue here.

Thus a court may refuse to exercise equity jurisdiction, without determining that there could be no remedy at law. See Morris & Essex R. R. *v.* Prudden (1869) 20 N. J. Eq. 530, Depue, J., 536, 537; and compare Bigelow *v.* Hartford etc. Co. (1842) 14 Conn. 565.

So, municipal corporations may escape liability, where an individual defendant might have been held liable. In several jurisdictions it has been held that counties, towns, etc., are not liable at common law for damage due to failure to keep highways in repair. They are not held in the absence of a statute imposing liability. See Holman *v.* Townsend (Mass. 1847) 13 Metc. 297; Brown *v.* Watson (1859) 47 Me. 161, 164; Gold *v.* Philadelphia (1886) 115 Pa. 184, 197-198; Baxter *v.* Winooski Turnpike Co. (1849) 22 Vt. 114, Bennett, J., 123-125.

[65]For the following translations from the Year Books, we are indebted to Prof. Joseph Warren.

Y. B. 5 Edw. IV, Hil. pl. 24.

"If there be a common way, and it is not repaired, so that I am damaged by the miring of my horse, I shall not have any action for that against him who ought to repair the way, but that is a popular action, in which case no single man will have an action for it, but it is an action by way of presentment, noted by Heydon, etc. 34 E. III. ca. 8, otherwise 27 H. 8. 36. 32. etc."

Y. B. 27 H. VIII, M. pl. 10.

"A certain person brought an action on the case against another, Submitting that where the plaintiff has been accustomed to have a road from his place as far as a close, etc., by the royal way to carry and recarry, etc., (and) there the defendant has stopped the Royal way, so that the plaintiff can not go into his place, etc., to the aforesaid close, he has tort to his damage. Baldwin. It seems that this action does not lie for the plaintiff on the stopping of the high way; for the King has the punishment of that, and it will be presented in the Leet, and there it will be redressed because it is a nuisance common to all the liege men of the King, and therefore there is no reason that a particular private individual will have an action for it; for by the same reason that that person shall have an action for it, by the same reason everyone will have

In the English cases decided between 1665 and 1867, the plaintiff has generally prevailed, whenever, under a sufficient declaration, he has proved actual damage to himself.

This includes the following decisions:

Maynell v. *Saltmarsh* (1665) 1 Keb. 847.
Hart v. *Basset* (1682) T. Jones, 156.
Jeveson v. *Moor* (1697) 12 Mod. 262; s. c. 1 Ld. Raym. 486.[66]
Chichester v. *Lethbridge* (1738) Willes, 71.[67]
Rose v. *Miles* (1815) 4 M. & S. 101.
Greasly v. *Codling* (1824) 2 Bing. 263.

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an action for it, and then he will be punished 100 times for the same case. Wherefore etc. Fitz Herbert to the contrary. And I fully agree that every nuisance done in the royal way is punishable in the Leet, and not by action unless it be (a case) where a man has greater hurt, or annoyance, than anyone has, and there he who has greater inconvenience or hurt, can have an action to recover his damages which he has by reason of this special hurt. For example, if one digs a ditch across the high way and I come riding along the way in the night and I and my horse are thrown into the ditch so that I am greatly damaged and inconvenienced therein, I shall have an action in this case against him who made this ditch across the way because I am more damaged thereby than anyone else; so here the plaintiff had more enjoyment of this high way than anyone else had and therefore when it is stopped he has greater damage because he has no other way thence to his close. Therefore it seems to me that he will have this action for this special matter; but if he did not have greater damage than anyone else then he will not have an action."

In Pollock on Torts (6th ed.) 387, note *J*, the learned author's note on the case in 27 Henry VIII begins thus: "Action for stopping a highway, whereby it seems the plaintiff was deprived of the use of his own private way abutting thereon (the statement is rather obscure)." The Pollock note, after quoting Fitzherbert, ends:—"Held that sufficient particular damage was laid." Compare 1 Street, Foundations of Legal Liability, 224-225.

The decision in 5 Edw. IV, unless defended on the ground that there is no liability for mere omission to repair, seems inconsistent with the now generally admitted doctrine that a plaintiff can recover for damage due to contact of his horse with obstructions in the way.

In 27 Henry VIII, the judges were unable to agree. Pollock seems to understand that the obstruction was upon that part of the highway which abutted on the entrance to plaintiff's private way; and thus had the effect of blocking immediate access from the private way to the highway and *vice versa*. We shall deal later with the distinction between an abutting landowner's private right of getting from his land on to the highway, and his right, as a member of the public, to travel along the highway after he has once got upon it.

[66]The Court of King's Bench was equally divided on this case; but upon reargument before the justices of the Common Pleas and the barons of the Exchequer, they were all of opinion for the plaintiff.

[67]It has sometimes been thought that the true ground for maintaining this action was because the defendant in person prevented the plaintiff from removing the obstruction. See argument in Winterbottom *v.* Lord Derby (1867) L. R. 2 Exch. 316, 319.

Wilkes v. *Hungerford Market Co.* (1835) 2 Bing. N. Cas. 281.[68]

In four early English cases (cited in the note below) where the plaintiff failed, there were fatal defects in the declaration. These cases are "warnings to pleaders".[69]

We have been speaking of the general drift of English authority up to 1867. In that year two cases were decided;[70] one of which was at first regarded in some quarters as revolutionary. Both these cases will be stated and commented upon later. We shall then attempt to show that the scope and effect of the *Ricket Case* has been very much overestimated; and that the *Winterbottom Case,* as to the principal point there decided, is erroneous. Neither decision is likely to make any lasting change in English law as to the points now under discussion.

As to the general tendency of American authority.

Here there is more conflict than in England. While a private action is sometimes denied, yet it is sustained in many cases. But there has been a strong tendency to give exceptional reasons for sustaining the action, instead of attempting to evolve and state a general principle. And in some States there is an inclination to construe very strictly statutes giving a right to damages in cases of discontinuance, change, or vacation of a highway.

If, in considering the cases decided in favor of the plaintiff, we look solely at the facts of each case, we should regard these decisions as establishing the general principle that, so far as the requirement of damage is concerned, actual damage is sufficient ground to support an action. But judges, in giving their opinions, have laid stress upon special circumstances in the particular instance which tend to make out a particularly strong case of actual damage. Readers of these opinions have sometimes thought that these special circumstances were regarded by the judge as forming the sole basis for his decision. The effect has sometimes been to minimise the importance of the decision. There has been a pro-

[68]If Hubert *v.* Groves (1794) 1 Esp. 148, is not reconcilable with the later cases of Rose *v.* Miles, and Greasly *v.* Codling, it must be regarded as overruled by them.

[69]Anonymous (1584) Moore K. B. 180, par. 321; Fineux *v.* Hovenden (1599) Cro. Eliz. 664; Pain *v.* Patrich (1692) Carth. 191; Stone *v.* Wakeman, Noy, 120.

[70]Ricket *v.* Metropolitan Ry. (1867) L. R. 2 H. L. 175; Winterbottom *v.* Lord Derby (1867) L. R. 2 Exch. 316.

pensity in some quarters to assume that recovery is permissible only in certain exceptional situations (only as to certain classes of damage); and to regard the specific instances where recovery has been permitted as constituting an arbitrary limit to the right of action. This restricted view seems to us entirely erroneous.

The general drift of American decisions can best be gathered from the discussion, soon to be entered upon, of "authority in regard to certain specific classes of cases".

Some points, however, may be noted here.

Two of the States which go farthest in opposing the private action are Massachusetts and South Carolina.[71]

Among the States where, at least, *some* of the decisions strongly support the private action, are Maine, New York, Pennsylvania, and Washington (in its later decisions).[72]

The most valuable extended American opinion, from our point of view, is that of Brown, J., in *Piscataqua Nav. Co.* v. *New York, N. H. & H. R. R.* (D. C. 1898) 89 Fed. 362; affirmed, except as to a single item of damage, in (C. C. A. 1901) 108 Fed. 92. The learned judge considers and satisfactorily answers some of the leading arguments often urged by defendant against the maintenance of a private action in this class of cases.[73]

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[71]For some prominent Massachusetts cases, see: Proprietors of Quincy Canal *v.* Newcomb (Mass. 1843) 7 Metc. 276, 283; Smith *v.* Boston (Mass. 1851) 7 Cush. 254; Harvard College *v.* Stearns (Mass. 1860) 15 Gray, 1; Willard *v.* Cambridge (Mass. 1862) 3 Allen, 574; Blackwell *v.* Old Colony R. R. (1877) 122 Mass. 1; Stanwood *v.* Malden (1892) 157 Mass. 17; Nichols *v.* Richmond (1894) 162 Mass. 170; Robinson *v.* Brown (1902) 182 Mass. 266; Dwyer *v.* New York, etc., R. R. (1911) 209 Mass. 419.

For South Carolina cases, see: Carey *v.* Brooks (S. C. 1833) 1 Hill Law, 365; Steamboat Co. *v.* Railroad Co. (1888) 30 S. C. 539; Steamboat Co. *v.* Railroad Co. (1895) 46 S. C. 327; Cherry *v.* Rock Hill (1896) 48 S. C. 553.

[72]See Brown *v.* Watson (1859) 47 Me. 161; Dudley *v.* Kennedy (1874) 63 Me. 465; Tuell *v.* Inhabitants of Marion (1913) 110 Me. 460; Pierce *v.* Dart (N. Y. 1827) 7 Cow. 609; Lansing *v.* Wiswall (N. Y. 1848) 5 Den. 213; Wakeman *v.* Wilbur (1895) 147 N. Y. 657; Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463; Philadelphia *v.* Collins (1871) 68 Pa. 106; Philadelphia *v.* Gilmartin (1872) 71 Pa. 140; Knowles *v.* Penn. R. R. (1896) 175 Pa. 623; Sholin *v.* Skamania Boom Co. (1909) 56 Wash. 303; Ingalls *v.* Eastman (1910) 61 Wash. 289.

[73]A draw in defendant's bridge over a navigable river fell, the fall being due to defendant's negligence; the channel was obstructed by the fallen draw. It was *held,* that the owners of a vessel detained by the obstruction could maintain an action for damages sustained by reason of the delay. The court, after coming to the above result on general principles, further said (p. 365) that the defendants could also be held liable for breach of special duty imposed by the statute which authorized the construction of the bridge.

The best short statement of American law, from the same point of view, is contained in the following *dicta* of Chancellor Walworth, in *Lansing* v. *Smith* (N. Y. 1829) 4 Wend. 9, 25:

Walworth, Chancellor. "If the defendants had erected these temporary bridges,[74] and were not authorized to do so, they might be indicted for a common nuisance. But the bridges might also be more injurious to some persons than to others. In such a case, if a person has sustained actual damage by the erection of the nuisance, whether direct or consequential, I am not prepared to say he cannot maintain an action against the wrong doer. If he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie. But the opinion I have formed on this point is, that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. The punishment of the wrong doer by a criminal prosecution will not compensate for the individual injury; and a party who has done a criminal act cannot defend himself against a private suit by alleging that he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all."

As to the weight of authority in regard to certain specific classes of cases:

For convenience of consideration, the cases may be roughly divided into two large classes, each of which must, in their turn, be subdivided.[75]

Class 1. Where damage is claimed for pecuniary loss due to inconvenience or inability of passing and repassing by plaintiff himself, without regard to any estate he may have.[76]

Class 2. Where plaintiff owns land adjacent to a public way, and claims that his position as an adjacent owner is a material element in sustaining his action.[77]

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[74]The learned Chancellor had previously said that there was no evidence to justify a finding that the defendants had erected the temporary bridges.

[75]Judge E. H. Bennett's classification in 19 Am. L. Reg. [N. S.] 624, has been followed to some extent. A single case may sometimes include claims under more than one class.

[76]In some cases of this class the plaintiff may, in fact, be an owner of land abutting on the way, but he does not now contend that such ownership is an essential element in favor of allowing his action, or that it affects the amount of damage recoverable therein. Plaintiff does not now claim that the obstruction has depreciated the salable, rentable, or usable value of his real estate.

[77]He may contend that, in certain cases, his position as an adjacent owner entitled him to sue without having to prove actual damage. Or, while admitting that in certain cases he must prove actual damage, he may contend that his position as an adjacent owner is material to be considered in determining whether he has in fact sustained actual damage.

As to questions arising under Class 1.

There is absolute unanimity in favor of recovery in one class of cases; *viz.*, where, without fault on his part, the plaintiff, or his tangible chattel, has been damaged by contact with an unlawful obstruction. And it is said to be no objection that a considerable number of persons suffered in the same way from the same cause.[78] These conclusions are entirely right; although, if such questions were to arise now for the first time, they might, perhaps, be disputed by some courts. But this case of contact was put as an illustration of actionable damage in one of the earliest discussions of this topic,[79] and has gone unquestioned ever since.

Efforts have been made to show that the allowance of a private action in the case of damage done by physical contact with the obstruction is consistent with the denial of such an action in the case where the obstruction causes delay or hindrance to the prosecution of a business enterprise, and thereby involves pecuniary loss.

Two explanations have been suggested. First: that there is an intrinsic difference in the legal nature of the damage suffered in the two cases. Second: that there is a material difference in the nature of the right violated in the two cases.

As to the first explanation: It is said that, in the case of contact, the damage to the plaintiff is "peculiar and special damage, not common to the public"; whereas, in hindering the use of the highway for business purposes, the damage is "not in its nature peculiar or specific", but "common and public."[80] Our answer to this view has already been given, in the discussion *ante* of the phrases "special", or "peculiar damage".[81] Where pecuniary loss results, the damage to a man's business is just as important and specific as the damage to his body in case of harmful contact. And damage of the former description may be quite as prejudicial as damage of the latter.[82]

As to the second explanation: In *Swain* v. *C. B. & Q. R. R.* (1911) 252 Ill. 622, 626, 627, Vickers, J., says in substance, that

[78]As to the last statement, see Stetson *v.* Faxon (Mass. 1837) 19 Pick. 147, 160; and Avery, J., in Farmers', etc., Mfg. Co. *v.* Albemarle, etc., R. R. (1895) 117 N. C. 579, 587.

[79]Y. B. 27 Hen. VIII, 27, pl. 10.

[80]See Shaw, C. J., in Smith *v.* Boston (Mass. 1851) 7 Cush. 254, 255-256.

[81]See *ante*, pp. 9-13.

[82]See Best, C. J., Greasly *v.* Codling (1824) 2 Bing. 263, 265; Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363.

delay of a person having occasion to pass on business, though resulting in loss of time and of business engagements, is merely an injury to his public right (to his right as one of the public) to use the street. But he says that, in the case of falling into the trench, "the injury to the person and property is a direct trespass upon the individual, and invades his personal and individual rights," and a recovery is sustained "on the ground that his personal individual rights, other than his right to use the highway, have been invaded."

It is submitted that the above reasoning confuses two very different things: *viz.*, (1) the nature of the duty violated by an obstruction of the highway (or, looking at it from another point of view, the nature of the defendant's tort); and (2) the nature of the damage to the plaintiff, resulting from the defendant's tort. In each of the cases now under consideration, the same duty was owed by the defendant to the plaintiff; namely, a duty that he must not, by obstructing the way, cause damage to individuals rightfully using the way. The difference lies in the character of the damage which the plaintiff suffers in consequence of the defendant's tort. In each instance, it is damage of a nature which the law will notice and for which it will afford redress. The plaintiff has an interest in having his body and his tangible chattels unharmed by wrongful contact. But he also has an interest in having his business undertakings free from pecuniarily damaging interference by tortious conduct.

Is a private action maintainable where a plaintiff's *performance of a contract* is prevented, or made more expensive, by an obstruction in a public way?

The authorities are not unanimous; but the weight of authority is decidedly in favor of allowing an action. The action has repeatedly been maintained where the contract did not provide for a penalty on the plaintiff in case of non-performance; though when the contract *does* contain such a provision, courts sometimes emphasize that feature.[88]

[88]For cases allowing action, see: Dudley *v.* Kennedy (1874) 63 Me. 465; Knowles *v.* Pennsylvania R. R. (1896) 175 Pa. 623; Milarkey *v.* Foster (1877) 6 Ore. 378; Sholin *v.* Skamania Boom Co. (1909) 56 Wash. 303; Tuell *v.* Inhabitants of Marion (1913) 110 Me. 460; Commissioners of Anne Arundel County *v.* Watts (1910) 112 Md. 353.

For cases against allowing action, see: Plewes *v.* Hall (1869) 29 U. C. Q. B. 472; Carey *v.* Brooks (S. C. 1833) 1 Hill Law, 365 (a case where plaintiff had contracted to deliver under a penalty).

Suppose that a plaintiff, though not under a contractual obligation to any one, is engaged in a business undertaking, and its progress is completely prevented, or rendered more expensive, by an obstruction in a public way; thus, in each instance, involving pecuniary loss to the plaintiff. Why should not he have an action just as much as the man who is prevented from performing a contract? He may encounter more practical difficulty in satisfactorily establishing the fact of his pecuniary loss. But if he succeeds in proving that fact, how does his case differ in principle from the former? While there is some conflict of authority, the weight is decidedly in favor of recovery.[84]

Is a private action maintainable, unless the plaintiff was obstructed while actually using, or attempting to use, the public way?

That may depend on whether the plaintiff knew that the obstruction existed and that the way was thus made impassable. If he can satisfy a jury, (1) that he had this knowledge, and (2) that he would have attempted to pass but for this knowledge, he ought not to be deprived of his action merely because he did not make

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[84]American authorities in favor of recovery: Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463; Wakeman *v.* Wilbur (1895) 147 N. Y. 657; Farmers', etc., Mfg. Co. *v.* Albemarle, etc., R. R. (1895) 117 N. C. 579; Carl *v.* West Aberdeen, etc., Co. (1896) 13 Wash. 616; Ingalls *v.* Eastman (1910) 61 Wash. 289; Mehrhof *v.* Delaware etc. R. R. (1888) 51 N. J. L. 56; Little Rock etc. R. R. *v.* Brooks (1882) 39 Ark. 403; Philadelphia *v.* Collins (1871) 68 Pa. 106; Philadelphia *v.* Gilmartin (1872) 71 Pa. 140; Gallagher *v.* Philadelphia (1897) 4 Pa. Super. Ct. 60, 61, 67; Brown *v.* Watson (1859) 47 Me. 161; Viebahn *v.* Commissioners of Crow Wing County (1905) 96 Minn. 276 (practically overruling 42 Minn. 532).

In the following case, where plaintiff recovered, the obstruction was in violation of a statute imposing a penalty if cars stood on a track more than five minutes. Patterson *v.* Detroit etc. R. R. (1885) 56 Mich. 172. And see 26 Iowa 377.

Authorities against recovery: Crook *v.* Pitcher (1884) 61 Md. 510; Jones *v.* St. Paul etc. R. R. (1896) 16 Wash. 25. (This last decision is practically overruled in 56 Wash. 38.)

Suppose that a physician, on his way to visit a patient, is inconvenienced and delayed by an obstruction in a highway. Can he maintain an action? We should say yes, if he thereby suffers pecuniary damage; *e. g.* through loss of time. There are *dicta* to the contrary in two American cases. See Eakin, J., 50 Ark. 83, 88; and Hoadly, J., in 2 Disney, 516, 542-543. In Boyd *v.* Great Northern R. R. [1895] 2 Ir. 555, a physician was delayed twenty minutes at a level railroad crossing by the gates being shut; the failure to open being due to the negligence of the railroad servants. This obstruction we take to have been in violation of a statute. See 6 B. & S. 709, 717-718. The court found that plaintiff sustained pecuniary damage from the delay, estimated at ten shillings. Plaintiff had judgment for that sum, and costs. Andrews, J., p. 557, regarded the plaintiff as having "suffered thereby some appreciable damage peculiar to himself beyond that suffered by other members of the public ordinarily using the highway."

an attempt which he knew would be unavailing. The defendant, who tortiously created the obstruction, ought not to escape compensating the plaintiff, because the plaintiff did not go through an idle ceremony.[85]

The authorities are not unanimous.

In judicial opinions, stress is sometimes laid upon the fact that, in the case before the court, the plaintiff, when delayed or stopped by the obstruction, was actually using the way and making an attempt to pass over it.[86] But judges who emphasize this fact do not thereby necessarily affirm that an actual attempt to pass is always indispensable to the maintenance of an action. The proven fact that plaintiff made an attempt relieves him from the burden of proving a sufficient reason for not making it. But omission to make the attempt is not, *per se,* conclusive against plaintiff's recovery.

The general view we have taken is sustained by *Dudley* v. *Kennedy* (1874) 63 Me. 465; where defendant, on p. 466, made the point that the plaintiff "did not load his boat and attempt to use the river; he only lost an abstract right to use it." This objection did not prevail.[87]

The contrary view is supported by *Burton* v. *Dougherty* (1879) 19 N. Brunsw. 51; and by the majority decision in *Powell* v. *Bunger* (1883) 91 Ind. 64. In the opinion in *Baxter* v. *Winooski Turnpike Co.* (1849) 22 Vt. 114, language is used favoring the view that an actual attempt to pass is an essential requisite to a private action. But the actual decision was based upon other points. See Bennett, J., pp. 123-125.[88]

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[85]If it be true, not only that a plaintiff did not attempt to pass over an obstructed road, but also that he had no occasion to pass over it, of course he cannot maintain an action for the obstruction thereon. See Appleton, J., in Brown *v.* Watson (1859) 47 Me. 161, 162.

[86]See Chichester *v.* Lethbridge (1738) Willes, 71; Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 468-469.

[87]See also Knowles *v.* Pennsylvania R. R. (1896) 175 Pa. 623; Burrows *v.* Pixley (Conn. 1792) 1 Root, 362, 364; *cf.* Wicks *v.* Ross (1877) 37 Mich. 464.

[88]There is another class of cases where a plaintiff would often have difficulty in inducing a jury to find that, but for an obstruction in a public way, he would probably have attempted a certain line of business. After an obstruction of a permanent nature has been created, a plaintiff alleges that he now desires to inaugurate a new enterprise or to resuscitate an old one, and that he is prevented from taking such a step solely by reason of the obstruction. Some courts are inclined to summarily dismiss such a claim, without submitting to a jury the question as to what the plaintiff probably would have done, if it had not been for the obstruction. An illustration is afforded by Clark *v.* Chicago & N. W.

Can a private person recover for pecuniary loss or expense incurred in removing an unlawful obstruction in a public way; either for time spent in removal or for money paid to accomplish that end?

Yes—if, at the time of removal, the plaintiff had occasion to use, and was actually attempting to use, the public way for legitimate purposes beneficial to himself; and if the obstruction really interfered with his right of passage.[89]

No—if, at the time of removal, the plaintiff had no occasion or desire to use the public way for any legitimate purpose beneficial to himself.

It is not enough that the plaintiff, having no interest except as a member of the general public, desires to test the legality of the obstruction. He cannot constitute himself a champion of the public for that purpose. He cannot claim pay for removing an obstruction which was theoretically damaging to the rights of the public, but which did not cause any actual damage to him individually.[90]

The foregoing distinctions go far to diminish the seeming conflict among the decided cases; and appear fully to justify the result reached in *Pierce* v. *Dart* (N. Y. 1827) 7 Cow. 609, and in *Lansing* v. *Wiswall* (N. Y. 1848) 5 Den. 213; where the expenses of removal were held recoverable from the obstructer.

In *Carey* v. *Brooks* (S. C. 1833) 1 Hill Law, 365 (one judge dissenting), recovery was refused. And in *Steamboat Co.* v. *Railroad Co.* (1888) 30 S. C. 539, it was held that plaintiffs

R. R. (1888) 70 Wis. 593. See also 32 N. Y. Supp. 590, 592; *cf.* 76 Iowa 165, 168; 252 Ill. 622, 628; 37 Mich. 464.

One reason for sustaining a demurrer to the complaint in the Wisconsin case was, that the damages alleged "rest entirely in contemplation". At the present time damages may be recovered, in various actions, for loss of future profits reasonably to have been expected in an established business which was wrongfully interfered with. But there is a strong disinclination to allow recovery for expected profits in a new business venture, which defendant wrongfully prevented plaintiff from inaugurating. See 1 Sedgwick, Damages (9th ed.) §§ 182, 183. Undoubtedly there are cases where a judge would be justified in ruling that there is no evidence on which a jury could reasonably find it probable that plaintiff, but for an obstruction in a public way, would have engaged in a new enterprise and would have acquired property thereby. But it may be doubted whether it is advisable for courts to establish an arbitrary rule that the question of probable future conduct can *never* be submitted to a jury.

[89]As to the last clause, see Waddell *v.* Richardson (1911) 17 Brit. Col. 19, 20; and Piggott, Torts, 162.

[90]Bidinger *v.* Bishop (1881) 76 Ind. 244; Hitchner *v.* Richman (1907) 74 N. J. L. 234.

could not recover for the expense of refitting, or rebuilding, their steamboats so as to admit of their passing under a bridge which was an unlawful obstruction.

Recovery was denied in *Winterbottom* v. *Lord Derby* (1867) L. R. 2 Exch. 316; a decision sometimes cited in good text-books as if it settled the law on this subject, but which seems to us erroneous. Kelly, C. B., who delivered the principal opinion, appears to overlook the distinction above suggested, and also to misapprehend one of the exact questions raised by the pleadings and evidence. He is very much influenced by the fear that a contrary decision would involve danger of a multiplicity of actions.[91]

We agree that a person having no interest except as a member of the general public, cannot sue to recover the expense incurred by him in removing an obstruction. But that was not the situation occupied by the plaintiff in the case then before the court. The plaintiff, in his declaration, alleged (*inter alia*) that defendant obstructed a public footway, that plaintiff was thereby hindered and prevented from passing along and using the footway; and was obliged to incur expense in removing the obstructions, "in order that he might and before he could pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same." Plaintiff obtained a verdict, at a trial upon an issue joined on defendant's plea of not guilty. Plaintiff proved that the footway was the shortest and most convenient way from his house to Prestwich; that he had been in the habit of using it; and that, while attempting to use it he was obstructed and delayed whilst persons, at his expense, removed the obstructions.

[91] Extracts from Kelly, C. B., L. R. 2 Exch. 316, 321, 322: "If we were to hold that everybody . . . who choses to incur some expense in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought." "In this case . . . I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained." If this sort of damage is recoverable, "anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring his action for the expense of removing it." If a person removes the obstruction, "he only incurs an expense such as any one who might go to remove the obstruction would incur. The damage is in one sense special, but it is, in fact, common to all who might wish, by removing the obstruction to raise the question of the right of the public to use the way." To say that "a person who thinks fit to go and remove the obstruction" can maintain an action "would really in effect be to say that any of the Queen's subjects could."

We think that the damage thus incurred by the plaintiff in removing the obstruction is "special" and "peculiar" to him, in the strongest sense of those terms. When the plaintiff has removed the obstruction and has incurred loss or expense thereby, no one else can sustain the *same* loss or expense from the *same* cause. Before the removal, many other travellers, if delayed by the obstruction, might have had an equal right with the plaintiff to attempt to remove it. But after the obstruction has been once removed by the plaintiff, it is impossible that other persons should subsequently remove it. True, the defendant may re-erect another obstruction in its place; but this (even though composed of the former materials) is a new obstruction. A fresh offense has been committed by its erection; and the removal of the second obstruction is an act entirely distinct from the removal of the first. If a defendant chooses to re-erect an obstruction after each removal, he cannot escape making compensation for the expense of each removal, on the ground that this would result in a multiplication of suits for the same cause. A suit for the expense of removing a later obstruction would not be for the same cause as a suit for the exepense of removing an earlier obstruction. It would be for a new and distinct cause.

Class 2. Where plaintiff owns land adjacent to a public way, and claims that his position as an adjacent owner is a material element in sustaining his action.[92]

Under this head an adjacent landowner sometimes claims that he has a "private right", over and above the right of passage which pertains to him as a member of the general public. Strictly speaking, the question of the existence or nature of the alleged "private right" does not fall within the scope of the present article, which relates to the "obstruction of a public right of passage over a public way." But it is difficult to deal effectively with the action for interference with the public right unless we first consider the question as to the alleged private right of an adjacent landowner. Indeed, unless we know what is claimed or conceded as to such "private right", it is almost impossible to get at the

[92]He may contend that, in certain cases, his position as an adjacent owner entitled him to sue without having to prove actual damage. Or, if he admits that in certain cases he must prove actual damage, he may contend that his position as an adjacent owner is material to be considered in determining whether he has in fact sustained actual damage.

gist of various reported decisions. Hence a brief consideration will be given here to questions arising as to the alleged "private right" of an abutting landowner or riparian proprietor.

Two very different private rights are claimed in behalf of the abutting landowner.

The first is, a right of immediate access from his abutting land to the public way, or from the public way to his adjacent land (sometimes spoken of as the right of immediate ingress and egress).

The second is, a right, over and above that of the members of the general public, to travel along the public way after he has once got upon it.[93]

The existence of the first alleged right is generally admitted.

In regard to the second, there is more controversy.

As to the first: If there is an obstruction upon that part of the public way which abuts on plaintiff's land, and it may materially impede the plaintiff's immediate access from his land to the public way, or *vice versa*, a private right of the plaintiff has been infringed.[94]

The plaintiff may sue without having to prove actual damage.[95]

These positions are fully sustained by English authority.[96]

It is no defense that the obstruction in the public way does not extend to the entire frontage of plaintiff's lot; or that the

[93]Compare the second and third classes in Judge Bennett's classification: 19 Am. L. Reg. [N. S.] 624.

[94]It has been said that the abutter's special right of access to and from that part of the highway which adjoins his lot is "a property right", just as much as his right to the lot itself. It might be safer to say that this special right has, for purposes of enforcement, the attributes of a property right: (1) so long as the way in question continues to be a public way; and (2) when the alleged obstructer is not acting under valid authority from the State. In the Solicitor's Journal, of January 11, 1913, Vol. 57, p. 184, there is an article on "A Frontager's Right of Access to the Highway," questioning the strict accuracy of the word "Right".

As to the right of the government to improve a navigable water way, without making compensation to a riparian owner whose access from his land to the river is thus impaired, see: United States *v.* Chandler-Dunbar Water Power Co. (1913) 229 U. S. 53; and compare conflicting view in 1 Farnham, Waters, 382, 383.

[95]Salmond, Torts (1st ed.) 269, § 91, par. 2; Pollock, Torts (6th ed.) 397-398.

[96]Rose *v.* Groves (1843) 5 M. & G. 613; Page-Wood, Q. C., Attorney General *v.* Conservators of the Thames (1862) 1 Hem. & M. 1, 31-35; Lyon *v.* Fishmongers' Co. (1876) 1 App. Cas. 662. See, especially, Lord Cairns, pp. 675-676, and Lord Selborne, pp. 681, 684-685; Salmond, Torts (1st ed.) 269-270, § 91.

plaintiff has an unobstructed access to his lot from other streets on other sides of his lot.[97]

As to the existence of the first alleged private right, American authorities go at least as far as the English.[98]

As to the second alleged private right:

Should the law, besides recognizing the abutting landowner's private right to get from his land on to the highway and *vice versa,* also recognize in him an additional private right, over and above the right pertaining to him as a member of the general public, to travel along the highway after he has once got upon it?

English authority answers in the negative. After he has once got upon the public way, he has only such right of travel along it as is common to him and the rest of the public. His right to travel on the way (his right to get to and from his land by going along the highway) is not superior to that of a non-landowning member of the public.[99]

Many American authorities appear to recognize the existence of the second private right; so far as relates to public *land* ways.[100]

The authorities as to the existence or recognition of the alleged second "private right" may be summed up as follows:

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[97]See Rorison *v.* Kolosoff (1910) 15 Brit. Col. 26; Randolph, Eminent Domain, § 410; Winslow, J., 121 Wis. 7; 18 Ky. L. Rep. 989, 990; Monks, J., Martin *v.* Marks (1900) 154 Ind. 549, 556.

For a different view, see the opinion of a very able judge, Mr. Justice Wardlaw, in McLauchlin *v.* Railroad (S. C. 1850) 5 Rich. Law, 583, 591.

[98]See, for instance, Brayton *v.* Fall River (1873) 113 Mass. 218; French *v.* Connecticut River Lumber Co. (1887) 145 Mass. 261. For an early statement, see argument for plaintiff in Harrison *v.* Sterret (Md. 1774) 4 Harr. & M. 540, 550. It would seem that Harvard College *v.* Stearns (Mass. 1860) 15 Gray, 1, might well have been decided for plaintiff upon this ground. See 19 Am. L. Reg. [N. S.] 630.

[99]See Buckley, J., in Chaplin *v.* Westminster Corporation (1901) 85 L. T. N. S. 88, 89; s. c. L. R. [1901] 2 Ch. 329. Salmond, Torts (1st ed.) 269-270, § 91, par. 3. Lyon *v.* Fishmongers' Co. (1876) 1 App. Cas. 662, Lord Cairns, 671. For some expressions of similar views by American judges, see Black, C., 91 Ind. 64, 68; dissenting opinion of Clark, J., 126 N. C. 897, 904-905.

[100]"According to the better view, as it seems to the writer, the private right of access is the right, not only to go from one's property to the street and from the street to the property, but also to use the street in either direction as an outlet to the general system of highways. This right extends at least to the next intersecting street." 1 Lewis, Eminent Domain (3rd ed.) § 191.

In some cases it is not easy to determine whether the decision in favor of an abutting landowner was based upon the infringement of a supposed special right of the landowner, or upon actual damage sustained by the plaintiff while in the exercise of a right he shared in common with other members of the public.

It is not recognized in England, either as to public land ways or public water ways. We prefer the English view.

We do not understand that it is generally recognized in the United States as to public water ways.

In regard to public land ways, it is recognized in the United States as to highways established by dedication, where lots and streets have been platted and sales of lots made according to the plat.[101]

There is a conflict of authority in the United States, where a highway has been established by condemnation. The majority view in such cases seems to recognize the alleged second private right.

Assuming that the first private right has not been infringed (*i. e.* that there is no obstruction on that part of the public way which abuts on plaintiff's land), and that the second private right is not recognized, what are the requisites to an action by an abutting landowner who complains of an obstruction to a right of passage belonging to him as a member of the public?[102]

The answer, in general terms, is: The same requisites that exist in an action by any other member of the general public.

We believe that, in the above enumerated classes of cases, an abutting landowner, who meets an obstruction while travelling on a part of the public way not adjacent to his land, cannot recover unless he sustains actual damage therefrom.[103] His action cannot "be based on higher or other ground than would be that of any one of the public" using the way and sustaining actual damage. Any other member of the general public (although not a landowner) has an equal right to sue if he, in his turn, sustains actual damage from the same obstruction. Where an

[101]In our newer States, in the establishment of streets in cities and villages, a particular method of dedication has been almost universally pursued. It may be (somewhat loosely) described as Dedication by Platting and Sale. This special method of dedication is not so common in England and in some of our older States. This difference in the method of establishing highways may largely account for unwillingness to recognize the existence of the alleged second private right. As to this particular method, see: 3 Dillon, Mun. Corps. (5th ed.) §§ 1083, 1084, 1086, 1087, 1090; 1 Lewis, Eminent Domain (3rd ed.) § 198; 1 Elliott, Roads and Streets (3rd ed.) §§ 128, 132, 165.

[102]This inquiry includes substantially all English cases; all American cases as to public water ways; and American cases as to public land ways laid out by condemnation, in those States which refuse to recognize the second private right in this class of ways.

[103]Actionable damage is not confined to damage due to physical contact with the obstruction. It would include damage due to prevention or delay in the performance of a business undertaking.

abutting landowner complains of the obstruction of the public right of passage at a point where the public way does not abut upon his land, it is incumbent upon him, just as much as upon any other plaintiff, to prove actual damage to himself. But, as a practical matter, we believe that a landowner is more likely to sustain actual damage than a non-landowner; and that it will often be much easier for the former to prove that he has sustained such damage. Ownership of abutting real estate "would obviously be an important element in the question whether special damage had in fact been sustained. . . ."[104]

In *Ryerson* v. *Morris Canal & Banking Co.* (1903) 69 N. J. L. 505, 507, 508, Pitney, J., said that, viewing the plaintiff (an abutting owner) "simply as a property owner", there might be difficulty in holding the damage to him sufficient to form the basis of a private action. "But", he added, "the present declaration exhibits the plaintiff in the capacity of a member of the public entitled to use the obstructed highway, who, by reason of special circumstances, had need to use it more frequently than others, and who sustained actual pecuniary loss because of being compelled to take a roundabout route in order to avoid the obstruction."[105]

In favor of recognizing the alleged second private right, it is sometimes urged that an obstruction upon a part of the highway which is not adjacent to plaintiff's land may as effectually prevent the beneficial use of his land (may as completely destroy its value) as an obstruction upon the part of the highway directly abutting upon his land.[106]

This is true. But it does not follow that it is necessary to invent or assert a special right in the landowner, in order that he may obtain compensation for his actual loss. The rejection of the erroneous tests of difference in kind and peculiarity of the damage, and the substitution of the correct test of actual damage, will enable the landowner to recover compensation. And this

[104]Compare Sir Montague E. Smith, in Bell *v.* Quebec (1879) 5 App. Cas. 84, 100; and Brown, J., in Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 364. And see Moss, J. A., 25 Ont. App. 251, 259.

[105]See Maynell *v.* Saltmarsh (1665) 1 Keb. 847; Rosekrans, J., Milhau *v.* Sharp (1863) 27 N. Y. 611, 627-628.

[106]See Angellotti, J., Cushing-Wetmore Co. *v.* Gray (1907) 152 Cal. 118, 123; Fell, J., *In re* Melon Street (1897) 182 Pa. 397, 403-404; Whitfield, C. J., Shoemaker *v.* Coleman (1909) 94 Miss. 619, 623; Osler, J. A., Drake *v.* Sault Ste. Marie etc. Co. (1898) 25 Ont. App. 251, 257.

result will be brought about without giving the landowner an unfair preference over a non-landowning member of the public, who has also sustained actual damage from the same obstruction. Each of these parties will be entitled to recover if, and only if, he proves actual damage to himself from an obstruction of the right of passage to which he is entitled as a member of the general public.

Whether a landowner has suffered actual damage from an obstruction located on that part of a public way which does not abut upon his premises, might seem to be a pure question of fact, as to which there need be no special rules of law. But there has been a tendency to establish hard and fast rules of law as to when a landowner can maintain an action. And, among the courts which incline to establish definite rules on this subject, there is some conflict as to what those rules should be.

There are four questions whose discussion has occupied a good deal of space in the reports. The first has been practically answered in a previous part of this paper. The other three remain to be briefly considered.

1. Does the fact that any other landowner actually suffers, or is liable to suffer, damage of a similar character to that sustained by the plaintiff constitute a fatal objection to recovery by plaintiff?

This is part of a broader question considered in an earlier part of this article (see 15 Columbia Law Rev. 18-23); and it has there been virtually answered in the negative. The correctness of this answer will be assumed in discussing the remaining three questions.

2. When is an action maintainable for totally or partially cutting off the connection of the landowner with the general system of public ways? How complete must be the deprivation of such connection? How serious must be the difficulty of making such connection?

3. What, if any, arbitrary tests as to the existence of causal relation between the obstruction and the damage to the individual landowner?

4. Does loss of business constitute a legal element of damage to a landowner from the obstruction of a public way?

As to Question 2.

There is pretty general agreement that an action lies where the obstruction completely cuts off the connection with the general

system. If the obstructed public way is a land way, it would generally be held that an action lies.[107] This is the rule even in Massachusetts,—a State conspicuous for narrowly restricting private actions.[108]

Suppose that the obstructed public way is a *water* way, and that the obstructions (while not interfering with immediate access from plaintiff's land to the water) completely cut off all connection, by travel along the water way, between plaintiff's land and the general system of water ways; especially connection with the ocean, the great public water highway of the world. No good reason is perceived why an action should not lie, the same as in the case of a land way; and there is authority to that effect.[109]

But there are authorities which deny liability in some cases of this description. This result is apt to be based on the alleged reason that the plaintiff's damage did not differ in character from that which was actually sustained, or was liable to be sustained, by some other member of the general public. This reason seems to us insufficient, for grounds heretofore stated.[110]

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[107]We do not suppose that a defense could be based upon the fact that there was a public *water* way left open to the plaintiff.

[108]Putnam *v.* Boston & Providence R. R. (1903) 182 Mass. 351, 354. See 1 Lewis, Eminent Domain (3rd ed.) § 204.

[109]Drake *v.* Sault Ste. Marie etc. Co. (1898) 25 Ont. App. 251, Moss J. A., 260-261. Hickok *v.* Hine (1872) 23 Ohio St. 523; Burrows *v.* Pixley (Conn. 1792) 1 Root, 362; Chatfield Co. *v.* City of New Haven (C. C. 1901) 110 Fed. 788.

[110]As to authorities denying liability in such cases:

A strong instance is Blackwell *v.* Old Colony R. R. (1877) 122 Mass. 1. See also O'Brien *v.* Railroad (1845) 17 Conn. 372; and Seeley *v.* Bishop (1848) 19 Conn. 128; but compare comments in 2 Wood, Nuisance (3rd ed.) § 694. See further, Whitehead *v.* Jessup (C. C. 1893) 53 Fed. 707 (opposed to the great weight of federal authority); Small *v.* Grand Trunk Co. (1857) 15 U. C. Q. B. 283; Archibald *v.* Queen (1893) 3 Can. Exch. 251, affirmed (1894) 23 Can. Sup. Ct. 147; Allen *v.* Board of Chosen Freeholders (1860) 13 N. J. Eq. 68; Carvalho *v.* B. & J. Turnpike Co. (N. Y. 1900) 56 App. Div. 522, affirmed 173 N. Y. 586.

It has been asserted that the Massachusetts decision in Blackwell *v.* Old Colony R. R. "is followed" in Frost *v.* Washington County R. R. (1901) 96 Me. 76. But this is an error. In the Massachusetts case, the alleged unlawfulness of the obstruction was admitted by the demurrer to the declaration, and yet the remedy by action was denied. In the Maine case, the decision for defendant was based upon the ground that the obstruction must be regarded as "a lawful obstruction"; having been expressly declared to be so by an Act of the U. S. Congress. The Maine court held, that, under the commerce clause of the United States Constitution, Article 1, Section 8, Paragraph 3, Congress has the power in the interests of commerce to authorize the obstruction and even closing of the navigation of a tide-water channel or cove. And it was also held, that this can be done without making compensation to one owning land adjacent to the cove, whose business and whose landed property are seriously damaged by the closing.

Suppose that obstructions on a public way cut off, in most directions, connection, by travel along the way, between plaintiff's land and the general system of public ways; but that there is an outlet left in a single direction.

There is a conflict of authority.[111]

In Massachusetts and some other States no action lies, even though the effect of such obstructions is to depreciate the value of plaintiff's land. See *Cram* v. *Laconia* (1901) 71 N. H. 41. The tendency in those States is to hold that depreciation of value cannot be regarded as special damage to the plaintiff, if any other landowner suffers, or may suffer, in the same way.[112]

In some other States an action lies if the obstruction has the effect of depreciating the value of the land.[113] And, in at least one State, Alabama, it would seem that the action lies in that case only. If we understand the Alabama decisions aright, no kind of damage other than depreciation of value will sustain an action by a landowner in that State.[114]

Some courts even though there is no depreciation in land value,

[111]See authorities collected in 1 Lewis, Eminent Domain (3rd ed.) § 202; and in 21 Am. & Eng. Encyc. of Law (2nd ed.) 714, n. 6.

[112]See 21 Am. & Eng. Encyc. of Law (2nd ed.) 714, n. 6.

[113]See 1 Lewis, Eminent Domain (3rd ed.) § 354, especially page 646.

[114]Compare Walls *v.* Smith (1910) 167 Ala. 138, where plaintiff failed, with the following cases where he succeeded: Sloss-Sheffield, etc., Co. *v.* McLaughlin (1911) 173 Ala. 76, 79; Duy *v.* Alabama, etc., R. R. (1911) 175 Ala. 162, 177.

As to recovery for alleged *permanent* diminution of value; where an obstruction is of such a character as is usually permanent, and where the creator of the obstruction apparently intends its continuance:

If the obstruction is legally authorized, and the plaintiff sues under a statute allowing him to recover damages, there would generally be no question of his right to recover for permanent depreciation in value.

Suppose, however, that the obstruction was not legally authorized and was wholly wrongful. Plaintiff, no doubt, can recover for *temporary* depreciation in rentable or usable value. But can he recover for *permanent* depreciation in value, for diminution in salable value?

Two views are entertained.

One is, that he cannot, under any circumstances, recover for permanent depreciation. The unlawful obstruction is liable to be abated by legal proceedings. In that case, a plaintiff, who had recovered for permanent depreciation, "would be restored to the full enjoyment of his property, and be paid for it besides." McKinstry, J., Hopkins *v.* W. P. R. R. (1875) 50 Cal. 190, 194; and compare Wardlaw, J., McLaughlin *v.* Railroad (S. C. 1850) 5 Rich. Law, 583, 592.

The other view makes the right depend on the form of plaintiff's action, and upon his willingness to acquiesce in the continuance of the obstruction in case he is permitted to recover as for a permanent depreciation. This view is thus expressed by Mitchell, J.: "Where the character of the injury is permanent, and the complaint for damages recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to acquire as a result of the suit the plaintiff's title to the right appropriated, we can see no reason why the damages may not be assessed on the basis of the permanent depreciation in value of the

would, we believe, allow an action for actual damage (*e. g.* pecuniary loss due to delay) caused by the obstruction to the landowner, when attempting to travel on the way for purposes connected with the beneficial use of his land.

We agree with Mr. Randolph, that the fact that a single outlet is left is not conclusive evidence that there is no legal injury to the property by cutting off connection in all other directions. "If a convenient way be cut off, leaving only a decidedly inconvenient one," it will often happen that the landowner thus incurs pecuniary loss, and may well be entitled to compensation.[115]

We have now to consider the case where the obstruction in the public way "is beyond the next cross street from the plaintiff's property."[116]

Plaintiff still has left, by the use of the cross roads, a connection with the general system; but it may be more circuitous, less convenient, and more expensive than the previous direct connection. Although each of the obstructions is at a point beyond the next intersecting street, yet the closing of the previous direct connection may render plaintiff's land less valuable for salable, rentable, or usable purposes.

By the great weight of authority, the plaintiff has no action.[117]

But it seems better,—and such appears to be the view preferred by Mr. Lewis,—to reject all arbitrary limitations. Justice

property injured . . . Where the action is in trespass, to recover for a past injury, treating the obstruction as unlawful, without any recognition of the right of the defendant to continue the obstruction, and acquire the right appropriated from the recovery and payment of a judgment, . . . only such damages as accrued up to the time of the commencement of the action are recoverable." Indiana, etc. R. R. *v.* Eberle (1886) 110 Ind. 542, 551; and see Cincinnati, etc. R. R. *v.* Miller (1905) 36 Ind. App. 26, 32-33.

Authorities are collected and discussed in 1 Sedgwick, Damages (9th ed.) §§ 93, 94, 95; and 3 Sedgwick, §§ 947, 1189, *et seq.* See also 1 Sutherland, Damages (3rd ed.) § 116, and 4 Sutherland, §§ 1016, 1038, 1039.

It may be suggested that the acquiescence of the plaintiff in the continuance of the obstruction to a highway would not prevent the public authorities from insisting upon its removal.

[115]See Randolph, Law of Eminent Domain § 411; and also the view expressed in 1 Lewis, Eminent Domain (3rd ed.) at end of § 202.

See also the very forcible views of Fell, J., *In re* Melon Street (1897) 182 Pa. 397, 403-404. The learned judge was there assuming that the abutting owner had "a special right" to use the street "as a means of access to his property". But his views as to what would constitute an infringement of such a special right have a bearing on the question what would be an actionable violation of the public right of using the street, (assuming the right of user to pertain to the landowner simply as a member of the general public).

[116]See 1 Lewis, Eminent Domain (3rd ed.) § 203.

[117]See 1 Lewis, Eminent Domain (3rd ed.) § 203 and n. 95, § 207 and n. 20.

would be more fully attained by laying down the broad rule, that an action lies if the obstructions, no matter at what point they are placed, have the actual effect of depreciating the value of plaintiff's real estate, or of causing actual damage to the plaintiff in some other way. The right to damages for depreciation "cannot be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction . . ."[118]

Question 3. What, if any, arbitrary tests as to the existence of causal relation between the obstruction and the damage?

Some cases might as well be classified under the preceding head (Question 2) as under the present head (Question 3). The difference sometimes seems to be more in the form of stating the issue than in its substance.

Two arbitrary tests may be suggested. One is, that there is no causal relation (*i. e.*, none that the law will recognize as justifying recovery), unless the obstruction is located upon the same street with the plaintiff's land.[119]

Another view, not capable of such definite statement as the foregoing, amounts in substance to this:—No causative relation is legally recognizable, unless the obstruction was but a short distance from (was within the immediate neighborhood of) the plaintiff's land. This principle, though not distinctly stated as the *ratio decidendi*, would seem to have been a substantial factor in inducing certain decisions where courts have refused to submit the question of causation to a jury.

Instead of the above test, we prefer to adopt another and a far broader view; namely, that there are no positive legal rules, no arbitrary limitations as to the distance, or position, of the obstruction. It is enough if the obstruction did, in fact, cause the diminution in value, or any other actual damage alleged by the plaintiff. The right to redress does not depend "on the proximity or distance of the operative cause of the injury."[120]

Under this view, the question of the existence of causal relation is one of fact for the jury. But this proposition "is necessarily subject to the limitation affecting the submission of all ques-

[118]See 1 Lewis, Eminent Domain (3rd ed.) § 354, p. 649, and § 207, p. 392: also cases cited under next topic as to causative relation; and Gose, J. (1911) 62 Wash. 218, 225.

[119]This view seems to have been made the basis of decision in Prosser *v.* City of Ottumwa (1876) 42 Iowa 509; explained in 43 Iowa 640.

[120]See Bryan, J., Lake Roland El. R. R. *v.* Webster (1895) 81 Md. 529, 535.

tions of fact to the jury: that if on the evidence reasonable men can come to only one conclusion, there is no question for their [the jury's] decision."[121]

This broad view is strongly sustained by decisions of the English and Scotch courts, in suits founded upon the statute which gives compensation where lands are "injuriously affected" by certain public works carried on by authority of Parliament. Two cases, each finally decided in the House of Lords, deserve special mention.[122]

Question 4. Does loss of business constitute a legal element of damage to a landowner from the obstruction of a highway?[123]

On principle, an affirmative answer seems correct.[124]

As to authority, there is certainly no preponderance against an affirmative answer. On the contrary, the weight of authority seems to favor it. Such was the decision, in 1835, in *Wilkes* v. *Hunger-*

[121]Parsons, J., in McGill *v.* Maine & N. H. Granite Co. (1899) 70 N. H. 125, 129. And see Lord Young, in Walker's Trustees *v.* Caledonian R. R. (1881) 8 Sc. Sess. Cas. (4th series) 405, 422.

[122]Metropolitan Board of Works *v.* McCarthy (1872) L. R. 8 C. P. 191; (1874) L. R. 7 H. L. 243. Walker's Trustees *v.* Caledonian R. R. (1882) 8 Sc. Sess. Cas. (4th series) 405; s. c. 7 App. Cas. 259.

Bramwell B., L. R. 8 C. P. 210. "Here the premises are injuriously affected, and for actual and potential purposes they are of less value. If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles off if there was no other within twenty of the premises affected."

See also Lord Penzance, L. R. 7 H. L. 263, 264; and Lord Selborne, Chancellor, 7 App. Cas. 285.

[123]It may be doubted whether No. 4 should be stated here as a distinct question. So far as it concerns the actionability of an obstruction of the public right of passage, it seems included under the previous Questions 2 and 3, especially the latter. It might be said that its solution simply calls for a special application of the general principles stated under those heads. If, on the other hand, it is regarded as chiefly important because it raises a particular point under the general law of damages, it might be thought foreign to the special subject of this article. Question 4 has repeatedly come before the courts, and, without attempting a full discussion upon principle, we here group together some authorities.

[124]See Salmond, Torts (1st ed.) § 92, pp. 272-273, par. 6.

It may be said that when his former customers cease to trade with a storekeeper, the latter has no action against them; they had a right to choose for themselves as to that matter. See Erle, C. J., in the Ricket Case, 5 B. & S. 160-162. The answer is, that the storekeeper had a right, *as against third persons*, that the third persons should not, by tortious interference, influence the choice to be made by the customers. See a fuller statement of this answer in an article on Labor Litigation, 20 Harvard Law Rev., 260-261.

It may also be said that the defendant's creation of the obstruction would not have caused the damage but for the intervening conduct of another person, *viz.*, the customer. But this would not be the unforeseeable intervention of an independent wrongdoer. The customer is blameless; and his subsequent conduct would generally be foreseeable. See 25 Harvard Law Rev. 118.

ford Market Co., 2 Bing. N. Cas. 281. This was regarded as settled law in England until the *Ricket Case*, which was finally decided in the House of Lords in 1867.[125] The latter case has sometimes been regarded as having virtually overruled the *Wilkes Case*.[126] But we agree with Mr. Salmond in disputing this view.[127]

Mr. Salmond says: "It is to be remarked, however, that there is nothing in the *decision* of the House of Lords in this case which is inconsistent with the *Hungerford Market Case*, and the observations made upon the latter case are *dicta* unnecessary to the matter in hand. *Ricket's Case* decides merely that on the true interpretation of the Lands Clauses Act and the Railways Clauses Act claims to compensation under these Acts are limited to damage done to the property affected, and do not extend to damage done to the good will of a business."[128]

Pollock says: "*Ricket's Case* is perhaps best treated as an anomalous decision on the construction of a statute with regard to particular facts. . . ."[129] While he seems inclined, though with evident reluctance, to regard the *Wilkes Case* as no longer law in England, he, nevertheless, adopts the principle of that case in the Draft of his Indian Civil Wrongs Bill;[130] and thinks it probable that the supposed English rejection of the *Wilkes Case* "would not be accepted in other jurisdictions where the common law is received."[131]

In *Benjamin* v. *Storr* (1874) L. R. 9 C. P. 400, and *Fritz* v. *Hobson* (1880) 14 Ch. D. 542, the plaintiff landowner prevailed. Whatever may have been *said* by counsel or judges, the *decision*

[125]Ricket *v.* Metropolitan Ry. (1867) L. R. 2 H. L. 175.

[126]See Willes, J., Beckett *v.* Midland R. R. (1867) L. R. 3 C. P. 82, 100.

[127]In the Wilkes Case, plaintiff was suing to recover damages for conduct which was tortious at common law. In the Ricket Case, there was no tort. The acts there done by defendants had been authorized by Parliament, whose power is not limited by any constitutional restrictions. Plaintiff would have had no remedy if the legislature had not enacted that he might be allowed to recover compensation for damage of a certain description. His action was founded upon this statute. The precise question was whether loss of customers was a kind of damage which could be recovered for *under that statute*. The statute allowed compensation where lands or interests in land were "injuriously affected" by the construction of certain legally authorized public works; in this instance, by the construction of a railroad under powers legally conferred upon a company. The decision was, that diminution in the business carried on upon land by the owner does not amount to injurious affection of the land; and hence is not ground of recovery under the statute.

[128]Salmond, Torts (1st ed.) § 92, par. 6, p. 272.

[129]Pollock, Torts (6th ed.) 612, note *d*.

[130]Pollock, Torts (6th ed.) 612.

[131]Pollock, Torts (6th ed.) 388, note *d*.

in these cases is not inconsistent with the result in the *Wilkes Case*. In L. R. 9 C. P. 406, Brett, J., distinguishes the *Ricket Case* from the case then before the court.[132]

The American authorities are not unanimous. Some conflicting United States and Canadian cases are cited in the note below.[133]

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[132]The Ricket Case cannot be regarded as a strong authority even upon the precise point there decided, *i. e.* as to the construction of the statute. The case went through three courts, and was passed upon by thirteen judges. Of these a majority, seven against six, were opposed to the decision finally rendered. See 5 B. & S. 149, 156. The final decision was concurred in by only two of the three Law Lords who heard the argument; and the third, who delivered a vigorous dissenting opinion, was no less a personage than Lord Westbury. The intrinsic correctness of the final decision has since been seriously questioned; see L. R. 8 C. P. 191, 212; and its incongruity with another decision has been very sharply brought out. See L. R. 8 C. P. 191, 205; and compare L. R. 7 H. L. 255, 264, 268.

Certainly the decision in Ricket's Case is "not strong enough to lift more than its own weight."

[133]Authorities tending, more or less directly, in favor of recovery.

Park *v.* C. & S. W. R. R. (1876) 43 Iowa 636; Brothers *v.* Tripp (1877) 11 R. I. 447, 453; Barnes *v.* Midland etc. Co. (N. Y. 1908) 126 App. Div. 435, 439; Harvey *v.* Railroad (1892) 90 Ga. 66; Brunswick & W. R. R. *v.* Hardey (1901) 112 Ga. 604; Telephone Co. *v.* Hirschman (1909) 43 Ind. App. 283, 289, 290; Callanan *v.* Gilman (1887) 107 N. Y. 360; Flynn *v.* Taylor (N. Y. 1889) 53 Hun 167, 168; s. c. (1891) 127 N. Y. 596, 600, 601. (Vann, J., p. 601: ". . . diversions of trade inevitably follow diversions of travel.") See also Brauer *v.* Baltimore etc. Co. (1904) 99 Md. 367. (Where obstruction of public road causes loss of custom to owner of toll-bridge, or toll-road, or ferry.) Draper *v.* Mackey (1880) 35 Ark. 497; Keystone Bridge Co. *v.* Summers (1878) 13 W. Va. 476; Streetville & Co. *v.* Hamilton, etc., Co. (1856) 13 U. C. Q. B. 600. (Where obstruction of river causes loss to Improvement Company, entitled to charge tolls.) Wisconsin River Improvement Co. *v.* Lyons (1872) 30 Wis. 61.

See also Gay *v.* Telegraph Co. (1882) 12 Mo. App. 485, 493; S. D. Thompson, J., in Heer Dry Goods Co. *v.* Citizens' R. R. (1890) 41 Mo. App. 63, 78. Black, J., in Glaessner *v.* Anheuser-Busch Ass'n. (1890) 100 Mo. 508, 516. Canton Warehouse Co. *v.* Potts (1891) 69 Miss. 31; Brown *v.* Florida, etc. Ass'n. (1910) 59 Fla. 447; Stetson *v.* Faxon (Mass. 1837) 19 Pick. 147, is regarded by Pollock as following Wilkes Case, there cited on p. 159 without disapproval. See Pollock, Torts (6th ed.) 612, note *d.* The Massachusetts court has tried very hard to distinguish Stetson *v.* Faxon from later decisions of its own, which seem inconsistent with Wilkes' Case. See Willard *v.* Cambridge (Mass. 1862) 3 Allen 574, 575.

See Schimmelmann *v.* Railroad (1911) 83 Oh. St. 356, 371. See also Aldrich *v.* Wetmore (1893) 52 Minn. 164. On the general subject, see note in 13 L. R. A. [N. S.] 253-257.

Authorities tending, more or less directly, against recovery.

Hohmann *v.* Chicago (1892) 140 Ill. 226; Walls *v.* Smith (1910) 167 Ala. 138, 145; Old Forge Co. *v.* Webb (N. Y. 1900) 31 Misc. 316; s. c. 65 N. Y. Supp. 503; affirmed in 57 App. Div. 636; Prosser *v.* City of Ottumwa (1876) 42 Iowa 509. (But see Beck, J., p. 511.) Heller *v.* Atchison, etc., R. R. (1882) 28 Kan. 625; Willard *v.* Cambridge (Mass. 1862) 3 Allen 574; Hamilton, etc. Co. *v.* Great Western R. R. (1859) 17 U. C. Q. B. 567.

See Liermann *v.* Milwaukee (1907) 132 Wis. 628; Talbott *v.* King (1889) 32 W. Va. 6; also Cram *v.* Laconia (1901) 71 N. H. 41, 50, 51.